

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATE: JAN 12 1989
CASE NO. 88-INA-297

IN THE MATTER OF

AUGUSTA BAKERY,
Employer

on behalf of

RYSZARD GURBISZ,
Alien

Richard J. Puchalski, Esq.
Chicago, IL
For the Employer

BEFORE: Litt, Chief Judge, Vittone, Deputy Chief Judge,
and Brenner, DeGregorio, Tureck, Guill and Schoenfeld
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

ORDER

In accordance with 20 C.F.R. §656.25(e)(2), the Certifying Officer ("CO") issued a Final Determination denying certification due to the Employer's failure to file a timely rebuttal of the Notice of Findings. Assuming, without deciding, that the CO has the authority to consider an untimely rebuttal, his decision not to do so in this case clearly was within his discretion. The Employer's explanation of why it filed its rebuttal 10 days late falls far short of establishing an abuse of discretion on the part of the CO.

Therefore, the denial of certification is affirmed.

JEFFREY TURECK
Administrative Law Judge

JT:jb

AUGUSTA BAKERY
88-INA-297

SCHOENFELD, Administrative Law Judge, joined by GUILL
Administrative Law Judge, writing separately.

Because the administrative-judicial review procedure set forth in 20 C.F.R. §656.26 is not available to Employer, this matter is not reviewable by the Board.

The Notice of Findings issued to Employer on December 7, 1987 advised Employer, as required by 20 C.F.R. §656.25(c)(3), that:

Failure to file a rebuttal in a timely manner shall constitute refusal to exhaust available administrative remedies. All findings in the Notice of Findings not rebutted shall be deemed admitted. If the rebuttal is not mailed by certified mail on or before 1-11-88, this Notice of Findings automatically becomes the final decision of the Secretary denying labor certification.

It is undisputed that on or before January 11, 1988, employer neither mailed its rebuttal nor requested an extension of time within which to file its rebuttal.

When the deadline passed without the filing of either the rebuttal or a request for an extension of time within which to file the rebuttal, the Notice of Findings automatically became the final decision of the Secretary of Labor denying labor certification and the administrative-judicial review procedure became unavailable to Employer. 20 C.F.R. 656.25(e)(2) & (3). The matter is thus not reviewable by the Board.

In the Matter of AUGUSTA BAKERY, 88-INA-297

Judge LAWRENCE BRENNER, concurring:

In my view, the failure of the Employer to show good cause for not even asking the C.O. to extend the time for rebuttal before the expiration of the 35 calendar day limit for rebuttal in 20 C.F.R. §656.25(c)(3) justifies affirming the denial of certification in this case. I would have preferred that the C.O. had expressly given this reason for his denial, upon receipt of the late rebuttal or in response to the Employer's subsequent request to the C.O. for reconsideration. Moreover, the C.O. should have filed a response to the arguments in the Employer's motion

before this Board, in which response the C.O. could have stated expressly the basis for his refusal to consider the Employer's late rebuttal.

LAWRENCE BRENNER
Administrative Law Judge